APPENDIX A

Opinion and Order of the District Court for the Southern District of New York (Bauman, J.) Denying Plaintiffs' Motion for a Preliminary Injunction, Dated October 16, 1972

BAUMAN, *D.J.*

This is an action challenging the approval by the Secretary of the Department of Health, Education and Welfare (HEW) of two project applications submitted by the New York State Department of Social Services. These two projects, the Public Service Work Opportunities Project (PSWOP) and Incentives for Independence (IFI) were finally approved as demonstration projects pursuant to Social Security Act § 1115 (42 U.S.C. § 1315) on June 1, 1972 for implementation starting August 1, 1972. A temporary restraining order, issued on August 4, 1972, prevented this and application has now been made for a preliminary injunction. Plaintiffs also petition for the convening of a three judge court pursuant to 28 U.S.C. §§ 2282 and 2284.

The PSWOP program has been approved for an initial period of one year and is to be in effect in 14 social service districts throughout the State. It requires every "employable" member of a family receiving welfare assistance under the Aid to Families with Dependent Children (AF DC) program to register with the New York State Employment Service for training and employment. Employability is determined by reference to specific guidelines which exempt certain types of welfare recipients; those already employed, receiving training, or unable to accept employment because of the need to care for dependents. If

employable under the guidelines, the recipient would be required to accept referral to a suitable manpower training program, or to employment in the public or private sector depending on his particular qualifications. If the recipient is unsuited for a training program or regular employment, he would be referred to a job specifically established by the PSWOP program. Failure to comply would result in loss of benefits.

The IFI program, also of one year's duration, is to operate only in three of the 14 areas. Like PSWOP, IFI requires welfare recipients to accept training or employment. PS WOP however, only permits recipients to "work off" their welfare grants. They can earn no more than their weekly welfare stipend. Under IFI, a recipient who receives a job could keep a portion of his earnings without a grant reduction and might thus be able to increase his monthly income. IFI differs from PSWOP in two other major aspects. It includes a "Work Motivation For Youth" program which provides jobs for children of AFDC families who are over 16 and attending school as well as counselling for families whose children are school truancy problems.

Both of these programs are specifically denoted to be experimental.

Plaintiffs fall into three categories: recipients of public assistance under AFDC, welfare rights organizations, and the City of New York and its Commissioner of Social Services. Their attack on the PSWOP and IFI programs is twofold. First, they allege that the programs are constitutionally defective because they deny plaintiffs' right to due process and equal protection secured by the Fifth and Fourteenth Amendments of the Constitution. Second, they allege that the programs fail to comply with various requirements of the Social Security Act (42 U.S.C. § 301 et seq.).

For the reasons stated below, I find the plaintiffs' Constitutional claims to be without substance, and that as a consequence, this Court lacks jurisdiction over the State defendants. Jurisdiction over the Federal defendants pursuant to the provisions of the Administrative Procedure Act is properly invoked.

I.

At the threshold, one encounters a serious question of standing with respect to two of the three categories of plaintiffs. Although plaintiffs do not address themselves to this question, and defendants do so only briefly, it is the view of the Court that the welfare organizations lack the requisite standing to sue and the City of New York has standing only with respect to the statutory claims.

The case of *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), seems determinative as to the welfare organizations. In that case, the Sierra Club sought a declaratory judgment and an injunction restraining Federal officials from approving a skiing development in a national forest. The Supreme Court reiterated the test of standing first enunciated in *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970) and *Barlow* v. *Collins,* 397 U.S. 159 (1970), i.e., plaintiffs have standing to challenge the action of a Federal administrative agency where such action caused them "injury in fact" and where that alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statute allegedly violated (397 U.S. at 153). In *Morton,* the Court found no indication that the Sierra Club would be significantly affected by the proposed development and observed that "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the

party seeking review must himself have suffered an injury." 405 U.S. at 738.

In *National Welfare Rights Organization* v. *Wyman*, 304 F. Supp. 1346 (E.D.N.Y. 1968), Judge Weinstein ruled that two welfare organizations were without standing to contest certain amendments to New York's Social Services Law because there was no showing of any injury to the organizations as distinct from the possible diminution of welfare benefits to its membership.

That is the case here as well.

The City of New York and its Commissioner of Social Services lack the standing to raise constitutional claims. The identical question arose in *City of New York* v. *Richardson*, —— F. Supp. ——, 71 Civ. 802 (S.D.N.Y. 1972), a case in which New York City sought to enjoin enforcement of the welfare provisions of the Social Security Act. Judge McLean held that a city, which is a political subdivision of a State, could not challenge the validity of a State statute on Fourteenth Amendment grounds, relying on *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36 (1933), the leading case on this question. *Williams* states: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (289 U.S. at 40). I concur with Judge McLean in finding continued vitality in the reasoning of *Williams* and find that it binds the City of New York and its Commissioner of Social Services here.

The City of New York does, however, have standing to challenge the Secretary's approval under the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. 5 U.S.C. § 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved

by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Whether this statute permits municipal corporations to challenge agency action was implicitly determined in *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F.2d 608 (2d Cir. 1965), which held, inter alia, that certain New York towns had standing to obtain review of an FPC decision to build a hydroelectric project. The Court there noted that the towns were "aggrieved parties" because the project's transmission lines would cause a decrease in the proprietary value of publicly held land, reduce tax revenues collected from privately held land, and interfere with long range community planning. See also, *Road Review League, Town of Bedford* v. *Boyd,* 270 F.Supp. 650 (S.D.N.Y. 1967), holding that a town had standing to challenge an administrative determination regarding the placement of highways.

Counsel for the City complains that the programs will involve it in additional expense of about $2.6 million.[1] Seen in relation to a total budget of over $8.6 billion and approximately 1¼ million people on the relief rolls the argument is almost trifling.[2] One would think the City would enthusiastically endorse a "responsible experiment" calculated to enrich the lives of its citizens by taking them off relief and putting them to self respecting work. However, in view of the alleged administrative burden and possible financial loss which New York City claims it will incur, I conclude that it is a "person aggrieved" within the meaning of 5 U.S.C. § 702 and may raise statutory claims.

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[1] See affidavit of Jule M. Sugarman, at pp. 3-4.

[2] See brief of amici curiae, at p. 12.

II.

Plaintiffs allege jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337; pursuant to 5 U.S.C. § 701 as to the Federal defendants, and pursuant to 28 U.S.C. § 1343(3) as to the State defendants. For the following reasons the Court holds that it is without jurisdiction over the State defendants, and is possessed of jurisdiction as to the Federal defendants pursuant to 5 U.S.C. § 701 only.

Before reaching this question however, it is necessary to consider plaintiffs' Constitutional arguments. All of these contentions are insubstantial and thus the ultimate thrust of the attack on the programs is reduced to construction of the appropriate statutes.

Plaintiffs make three Constitutional claims. The first is to be found in the fifth and sixth claims of their complaint which charge that the implementation of the PSWOP and IFI programs in 14 social services districts in the State affect only one quarter of the State's welfare recipients. This, they argue, constitutes invidious discrimination in violation of the Fifth and Fourteenth Amendments' guarantee of equal protection. The recent case of *Dandridge* v. *Williams,* 397 U.S. 471 (1970), is a direct answer. It involved a suit by AFDC recipients to enjoin application of a Maryland maximum grant regulation as inconsistent with the Social Security Act and the Equal Protection Clause. The Supreme Court disposed of the equal protection argument as follows: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" (397 U.S. at 485). See also, *Jefferson* v. *Hackney,* 406 U.S. 535 (1972).

It is beyond reasonable dispute that the classification here at issue has a rational basis. The programs which the plaintiffs allege to be discriminatory are experimental projects of limited duration. New York State, in cooperation with the Federal government, has undertaken them to gain experience bearing on whether they should ultimately be applied throughout the State. It is not a matter of a State capriciously requiring some welfare recipients to work and exempting others. The classifications created for the experiment are neither arbitrary nor intended to be permanent. The districts clearly were selected in order to provide an adequate sampling of welfare recipients of various ethnic backgrounds as well as those from urban, suburban and rural areas and, seen in this light, seem eminently reasonable.

Plaintiffs' second Constitutional argument is that standards and defined procedures to be followed in the operation of the project are so utterly lacking as to be violative of the Due Process Clause of the Fifth and Fourteenth Amendments. They argue that the only standards provided are "tried and true catch words like 'good cause', 'adequacy', and 'suitability'" and that the individual case worker is left with virtually unfettered discretion. However, the materials submitted by the Department of Social Services in support of the PSWOP and IFI proposals contain a detailed list of the factors that are intended to guide administrative decisions. The criteria of employability, set out in the margin,[3] are as precise as might reasonably

[3] A recipient will be found employable and thereby subject to IFI or PSWOP work requirements except by reason of:

1. full-time employment;
2. attendance at school, including a vocational or technical school, a college or a university, for a minor other than an emancipated minor;

be required and further specificity would, it seems to me, impose insuperable burdens upon draftsmen and administrators alike.

Plaintiffs' final Constitutional attack depends upon an assumption that the PSWOP and IFI programs fail to provide a pretermination hearing as mandated by *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). However, the Social Services

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3. attendance full-time in grade or high school for an emancipated minor;
4. full-time, satisfactory participation in an approved program of vocational training or rehabilitation which shall include but not be limited to participation in the Work Incentive Program or a two-year college program with a specific vocational objective;
5. part-time employment to the extent permitted by medical verification, or to the extent permitted by inability to secure adequate care for children or other incapacitated members except on a part-time basis;
6. mental or physical illness or incapacity medically verified to be of such significant or substantial nature as to prevent such person from engaging in employment; age shall be a basis of unemployability only when it is verified that the individual is potentially hazardous to himself or others with whom he is associated; and persons with a history of drug addiciton shall be deemed employable only when determined medically to be free of drug use or to be participating in a methadone maintenance program or a rehabilitation program; or
7. the need of such person to provide full-time care for other members of such person's household who are verified to be wholly incapacitated, or who are children, and for whom required care is not otherwise reasonably available, notwithstanding diligent efforts by such person and the social services district to obtain services or the assistance of others to provide such care.

In addition the following two conclusions applicable to all AFDC recipients are added in the project districts:

8. mothers or relatives caring for children under age 6;
9. mothers or female caretakers of children if the father or other adult male relative in the home is registered.

Department of New York State pursuant to 18 N.Y.C.R.R. § 385.1 et seq. has committed itself[4] to providing a hearing as to any PSWOP or IFI decision that might affect a recipient's right to receive public assistance. This would seem to insure a hearing to anyone challenging a determination of employability or a particular job assignment. Under the programs a recipient would continue to receive his grant whether or not he reported to his job assignment until the outcome of the hearing is decided—a provision seemingly designed to comply with the *Goldberg* standard. See also, *Dublino* v. *New York State Department of Social Services,* —— F.Supp. ——, Civil 1971—306 (W.D.N.Y. 1972), in which a three-judge court recognized that New York's hearing provisions satisfied the *Goldberg* test.

Accordingly, plaintiffs' Constitutional arguments seem so insubstantial as to require that I deny their motion to convene a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284.

III.

Plaintiffs argue that the Court has jurisdiction over both State and Federal defendants pursuant to 28 U.S.C. §§ 1331[5] and 1337.[6] The invocation of § 1337 is clearly

[4] See State defendants memorandum of law, p. 29 et seq.

[5] § 1331 provides, in pertinent part:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

[6] § 1337 provides:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

frivolous. The Social Security Act is not an act "regulating commerce or protecting trade and commerce against restraints and monopolies" as Chief Judge Friendly noted in *Almenares* v. *Wyman*, 453 F.2d 1075 at 1082 (2d Cir. 1971), cert. denied 405 U.S. 944 (1972). Nor does this Court possess jurisdiction under 28 U.S.C. § 1331, the statute which provides for general "arising under" jurisdiction. None of the plaintiffs alleges an individual financial loss of $10,000 and *Snyder* v. *Harris*, 394 U.S. 332 (1969), precludes the aggregation of claims.

Plaintiffs further contend that 28 U.S.C. § 1343[7] confers jurisdiction over the State defendants. Although this question has not yet been finally resolved by the Supreme Court, this Circuit has held in *Almenares* v. *Wyman, supra*, that a substantial Constitutional claim is essential for jurisdiction under § 1343(3) because the Social Security Act is not an "act providing for equal rights of all citizens." Statutory claims do not suffice. As indicated, I regard the Constitutional claims in the instant case as insubstantial

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[7] 28 U.S.C. § 1343 provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1935 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

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and I therefore hold that no jurisdiction attaches to the State defendants pursuant to § 1343.

IV.

Jurisdiction over the Federal defendants does exist under 5 U.S.C. § 701 et seq., providing for judicial review of the actions of Federal agencies. The narrow issue before this Court then is whether the Secretary's determination, under 42 U.S.C. § 1315, that the PSWOP and IFI programs were likely to promote the objectives of Title IV-A of the Social Security Act was erroneous. The scope of judicial review of the Secretary's action is defined in 5 U.S.C. § 706. In essence, the statute requires this Court to determine, whether the Secretary's action was "arbitrary, capricious, an abuse of discretion", "contrary to Constitutional right", or "in excess of statutory jurisdiction." The Supreme Court has recently set the standards lower courts must apply in making such determinations. "To make this finding, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971).

After a careful study of the PSWOP and IFI programs, I have concluded that the approval of the Secretary was not erroneous. 42 U.S.C. § 1315 clearly states the consideration that is to guide the Secretary's decision here. The pilot or demonstration project may be approved if in the Secretary's judgment it is likely to assist in promoting the objectives of Title IV-A of the Social Security Act. Among the objectives of the Act, and the AFDC program in par-

ticular, are the strengthening of family life and the attainment of "maximum self-support and personal independence consistent with the maintenance of continuing parental care." (42 U.S.C. § 601). The Secretary obviously had these precise objectives in mind when he approved the PSWOP and IFI programs. They require welfare recipients to work in the hope that they learn the necessary skills so that they may live fuller and more productive lives thereafter. It is not the function of this Court under such circumstances to weigh the conflicting policy considerations that were brought to bear in devising these programs; that was the task of the State and Federal officials who formulated them. The Court's sole function here is to monitor the approval of the Secretary and to determine whether his decision was consistent with the objectives of the AFDC provisions of the Social Security Act. That it obviously is.

I must, however, advert briefly to plaintiffs' principal statutory argument. They contend that § 1315 forbids the approval of projects which diminish any statutory rights or entitlements established under the Social Security Act. The PSWOP and IFI programs, they argue, effectively diminish such rights and entitlements by forcing upon welfare recipients increased expenses for additional food, clothing and the like while their welfare stipend remains the same. This argument might have some cogency were one to accept plaintiffs' interpretation of § 1315. However, it has no authority either in the language of the statute or in its legislative history.[8] That section merely provides that

[8] A recent decision of the U.S. District Court for the Northern District of California rejected precisely the same interpretation of § 1315 urged by plaintiffs. In *California Welfare Rights Organization* v. *Richardson*, —— F.Supp. —— (Civil No. C-72 341 ACW), the Court upheld the Secretary's approval of the "California copayment experiment", a program whereby those eligible would

an approved project must be "likely to assist in promoting the objectives of" various titles of the Social Security Act. Obviously, a program which limits or varies certain of the various statutory entitlements may nevertheless further the objectives of the Social Security Act. Among these objectives, as has already been noted, is the desirability of increasing the independence and self sufficiency of welfare recipients and to assist in their integration into the work force.

Defendants do not dispute plaintiffs' contention that the PSWOP and IFI programs may slightly increase the weekly expenditures of welfare recipients, although the State Commissioner of Social Services has represented that the cost of transportation, lunch and clothing will be absorbed by the State. They contend that the programs may ultimately lead to the removal of recipients from the welfare rolls and thus serve the objectives of the Social Security Act despite any short term detriment to recipients participating in the projects. It must be remembered here that this is an experimental program of limited duration; a thorough evaluation after the program has run its course should disclose whether it has resulted in an actual, substantial diminution of benefits to welfare recipients.

Plaintiffs finally contend that the PSWOP and IFI programs are inconsistent with 42 U.S.C. § 602(a)19,[9] the so-

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"co-pay" for medical assistance which the State provided. The plaintiffs argued that § 1315 forbade any diminution of medical benefits, but the Court found nothing in the language of § 1315 to support such an argument.

[9] 42 U.S.C. § 602(a)19 provides:

> A state plan for aid and services to needy families with children must provide—
>
> (A) for the prompt referral to the Secretary of Labor or his representative for participation under a work incentive program established by part C of—

(footnote continued on next page)

called work incentive or WIN program. WIN, administered by the Department of Labor, is a comprehensive manpower services, training and employment program. PSWOP

(i) each appropriate child and relative who has attained age sixteen and is receiving aid to families with dependent children,

(ii) each appropriate individual (living in the same home as a relative and child receiving such aid) who has attained such age and whose needs are taken into account in making the determination under section 602(a)(7) of this title, and

(iii) any other person claiming aid under the plan (not included in clauses (i) and (ii)), who, after being informed of the work incentive programs established by part C, requests such referral unless the State agency determines that participation in any of such programs would be inimical to the welfare of such person or the family;

except that the State agency shall not so refer a child, relative, or individual under clauses (i) and (ii) if such child, relative, or individual is—

(iv) a person with illness, incapacity, or advanced age,

(v) so remote from any of the projects under the work incentive programs established by part C that he cannot effectively participate under any of such programs,

(vi) a child attending school full time, or

(vii) a person whose presence in the home on a substantially continuous basis is required because of the illness or incapacity of another member of the household;

(B) that aid under the plan will not be denied by reason of such referral or by reason of an individual's participation on a project under the program established by section 632(b)(2) or (3) of this title;

(C) for arrangements to assure that there will be made a non-Federal contribution to the work incentive programs established by part C by appropriate agencies of the State or private organizations of 20 per centum of the cost of such programs, as specified in section 635(b) of this title;

(D) that (i) training incentives authorized under section 634 of this title, and income derived from a special work project under the program established by section 632(b)(3)

and IFI must be invalid, so the plaintiffs argue, insofar as their requirements conflict with those of WIN. All cases

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of this title shall be disregarded in determining the needs of an individual under section 602(a)(7) of this title, and (ii) in determining such individual's needs the additional expenses attributable to his participation in a program established by section 632(b)(2) or (3) of this title shall be taken into account;

(E) that, with respect to any individual referred pursuant to subparagraph (A) who is participating in a special work project under the program established by section 632(b)(3) of this title, (i) the State agency, after proper notification by the Secretary of Labor, will pay to such Secretary (at such times and in such manner as the Secretary of Health, Education, and Welfare prescribes) the money payments such State would otherwise make to or on behalf of such individual (including such money payments with respect to such individual's family), or 80 per centum of such individual's earnings under such program, whichever is lesser and (ii) the State agency will supplement any earnings received by such individual by payments to such individual (which payments shall be considered aid under the plan) to the extent that such payments when added to the individual's earnings from his participation in such special work project will be equal to the amount of the aid that would have been payable by the State agency with respect to such individual's family had he not participated in such special work project, plus 20 per centum of such individual's earnings from such special work project; and

(F) that if and for so long as any child, relative, or individual (referred to the Secretary of Labor pursuant to subparagraph (A)(i) and (ii) and section 607(b)(2) of this title) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the

cited by plaintiffs in support of this proposition,[10] among them *Dublino* v. *New York State Department of Social Services,* —— F.Supp. —— (W.D.N.Y. 1972), held that *State* work programs inconsistent with WIN are invalid because they violate the Supremacy Clause. They are obviously inapposite, however, because PSWOP and IFI are not State but Federal programs approved by the Secretary of HEW and the Supremacy Clause is not applicable.

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determination under clause (7), and aid for any dependent child in the family in the form of payments of the type described in section 606(b)(2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days make payments of the type described in section 606(b)(2) of this title (without regard to clauses (A) through (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clause (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor;

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[10] *Woolfolk* v. *Brown,* 325 F.Supp. 1162 (E.D.Va. 1971), aff'd 456 F.2d 652 (4th Cir. 1972); *Bueno* v. *Juras,* —— F.Supp. —— (D.Ore. 1972); *Jeffries* v. *Sugarman,* 345 F.Supp. 172 (S.D.N.Y. 1972).

The inconsistencies between PSWOP and IFI and § 602(a) 19 are of course covered by the provisions of 42 U.S.C. § 1315 already cited, which permit the Secretary to waive any of the requirements of § 602 in approving a demonstration project. Although plaintiffs argue that there has been no explicit waiver by the Secretary of § 602(a)19, a fair reading of the "Action Memorandum" approved by the Secretary for the PSWOP program (Federal defendants' Exhibit A) or for the IFI program (Exhibit B) compels the conclusion that § 602(a)19 is implicity waived by the Secretary's waiver of § 602(a)10. The memorandum shows an awareness of the possible inconsistency between the PSWOP program and § 602(a)19 and the acknowledgment of such inconsistency in itself constitutes a waiver.

For all of the reasons given above, plaintiffs' motion to convene a three-judge court is hereby denied, and their motion for a preliminary injunction against enforcement of the PSWOP and IFI programs in New York State is hereby denied.

The above constitute my findings of fact and conclusions of law in accordance with Rule 52(a) Fed. R. Civ. P.

So ordered.

Dated: October 16, 1972

/s/ Arnold Bauman
U.S.D.J.

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit (Friendly, Ch. J., Hays, Waterman, C.JJ.), Modifying the Order of the District Court and, as Modified, Affirming the Denial of the Preliminary Injunction, Dated January 18, 1973

(See Opposite) ☞

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 479, 508—September Term, 1972.

(Argued December 1, 1972 Decided January 18, 1973.)

Docket Nos. 72-2195
72-2243

LYDIA AGUAYO, RUTH BOWEN, HELEN POSNER, EDNA VEAL, NILSA SANTANA, and HYACINTH CADOGAN; individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

—and—

CITY OF NEW YORK and JULE SUGARMAN, Commissioner of the Department of Social Services for the City of New York,

—and—

UPSTATE WELFARE RIGHTS ORGANIZATION, CITYWIDE COORDINATING COMMITTEE OF WELFARE RIGHTS GROUPS, ROCKLAND COUNTY WELFARE RIGHTS ORGANIZATION, BROOKLYN WELFARE ACTION COUNCIL, WELFARE RECIPIENTS ACTION GROUP OF RED HOOK, SUNSET PARK WELFARE RIGHTS ORGANIZATION, and UNITED WELFARE LEAGUE,

Appellants-Plaintiffs,

—against—

ELLIOT R. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare; JOHN D. TWINAME, Administrator, Social and Rehabilitation Service; and ELMER SMITH, Regional Commissioner, Social and Rehabilitation Service; individually and in their offi-

cial capacities; and THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

—and—

ABE LAVINE, individually and in his official capacity as Commissioner of Social Services of the State of New York; and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Appellees-Defendants.

Before:

FRIENDLY, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Arnold Bauman, *Judge,* denying a preliminary injunction against New York State's carrying out two experimental work projects, approved by the Secretary of Health, Education and Welfare, for employable members of families receiving assistance under the Aid to Families with Dependent Children program.

Modified and Affirmed.

ADELE M. BLONG, Esq. (Steven J. Cole, Esq., Henry A. Freedman, Esq., and NLSP Center on Social Welfare Policy and Law, Inc., New York, N.Y., of Counsel), *for Appellants Aguayo, et al., and Upstate Welfare Rights Organization, et al.*

PAULA OMANSKY, Esq. (Norman Redlich, Esq., Corporation Counsel, City of New York, of Counsel), *for Appellants City of New York and Jule Sugarman.*

JOSEPH P. MARRO, Esq., Assistant United States Attorney (Whitney North Seymour, Jr., Esq., United States Attorney for the Southern District of New York, Jerome T. Levy, Esq., and Thomas Scarlett, Esq., Department of Health, Education and Welfare, of Counsel), *for the Federal Appellees.*

AMY JUVILER, Esq., Assistant Attorney General (Louis J. Lefkowitz, Esq., Attorney General of the State of New York, Samuel A. Hirshowitz, Esq., First Assistant Attorney General, and Constance B. Margolin, Esq., Law Apprentice, New York, N.Y., of Counsel), *for Appellees Lavine and New York State Department of Social Services.*

—and—

(Robert J. Egan, Esq., Marion P. Ames, Esq., and Mildred A. Shanley, Esq., New York, N.Y., of Counsel), *for various civic and social organizations appearing as Amici Curiae in support of the contentions of Appellants-Plaintiffs.*

FRIENDLY, *Chief Judge:*

This appeal is from an order of Judge Bauman in the District Court for the Southern District of New York denying a preliminary injunction in an action by three sets of plaintiffs to enjoin the New York State Commissioner of Social Services and the State Department of Social Services (NYSDSS) from carrying out two experimental work project programs for employable members of families receiving assistance under the partially federally funded Aid to Families with Dependent Children

(AFDC) program and to set aside the approval of the programs by the Secretary of Health, Education and Welfare under the demonstration project provision of the Social Security Act, 42 U.S.C. § 1315. The three sets of plaintiffs are: six women who might be required to take employment under the projects, suing individually, on behalf of their minor children and of other persons similarly situated; the City of New York and Jule Sugarman, Commissioner of its Department of Social Services, both of whom will have roles in administering the projects; and seven welfare rights organizations. There are two sets of defendants. One, the federal defendants, comprises the Secretary of Health, Education and Welfare (HEW), the Administrator of its Social and Rehabilitation Service; its Regional Commissioner; and the Department itself. The other set, the state defendants, includes New York's Commissioner of Social Services and the Department of Social Services.[1]

I. *The Nature of the Two Projects*

The two projects, known as Public Service Work Opportunities Project (PSWOP) and Incentives for Independence (IFI), were formulated by the State Department of Social Services and approved by HEW for one year.[2]

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1 In light of the naming of the individual defendants we have no occasion to consider the propriety of the unnecessary joinder of the Department of HEW and the New York State Department of Social Services.

2 Statutory authorization for IFI's development and its submission to HEW can be found in N.Y. Soc. Serv. Law § 29-a (McKinney Supp. 1972). The statutory basis for PSWOP is less clear. The state seems to rely on id. § 350-k-1, see PSWOP Policy and Procedures, at 1, even though that section provides for what seems to be a statewide program. But since the question of state authorization has not been raised, and because we cannot say that legislative approval of a statewide program does not include the power to establish demonstration projects, we will join the parties in assuming that PSWOP has been properly established by the State.

The State envisions PSWOP as providing public service work opportunities for those AFDC recipients who are able to work but for whom regular employment, training or public service employment has not been available or appropriate. Approximately 25% of the State's AFDC cases, comprising those recipients living in fourteen welfare districts in New York City, two counties in the metropolitan area surrounding the City, three upstate urban areas and six counties in the rest of the state, are to be included in PSWOP.

The local departments of social services in PSWOP districts must see to it that employable recipients[3] of AFDC benefits register with the appropriate office of the New York State Employment Service. Semi-monthly interviews are to be scheduled for the recipients with employment counselors so that an employment plan, for a private sector job, training, public service employment (in IFI districts only), or a PSWOP job, can be developed. If the state employment service is unable to find other employment or a training program within thirty days, assignment of the recipient to a PSWOP job becomes mandatory. PSWOP employ can involve work for any state, city, town or village agency or school district located in the county. Broadly speaking, the work will be of the sort which, because of budgetary problems or otherwise, would not be undertaken except for PSWOP; workers in the program are not to displace those who would otherwise be employed.

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3 But for two additional exemptions, employability for purposes of PSWOP is defined by N.Y. Social Serv. Law § 131.4 (McKinney Supp. 1972), which closely parallels the standards set out in the federal work incentive (WIN) program. Compare 42 U.S.C. § 602(a)(19)(A). Also exempt from PSWOP are: (1) mothers or relatives caring for children under 6 years old; and (2) mothers or female caretakers of children if the father or other adult male relative in the home is registered. However, any exempt recipient may register on a voluntary basis.

No individual will be required to participate in PSWOP unless satisfactory child-care arrangements can be developed, and each case must be assessed to determine adequacy, although the state requires that "[d]iligent efforts . . . be made by [the recipient] and the social services district to obtain child care services or the assistance of others to provide such care." Public Service Work Opportunities Project (for ADC and ADC-U Recipients) Policy and Procedures, at 3 [hereinafter PSWOP Policy and Procedures].

PSWOP workers will not receive earnings over and above their welfare benefits. The number of hours to be worked will be determined by dividing the amount of the participant's grant by the hourly wage to be received, but in no case will an individual be required to work more than eight hours a day or forty hours a week. The hourly rate will be the state minimum wage or the wage paid to employees for comparable work in the unit of government in which the project is conducted, whichever is higher. Participants will be reimbursed for lunch and transportation costs, and all work-related expenses incident to participation are to be paid "so that no recipient will incur any actual net reduction in income due to such participation." HEW Action Memorandum (re PSWOP), May 31, 1972, at 5.[4] Participants will also be covered by workmen's compensation. See N.Y. Soc. Serv. Law § 350k-3(d).

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4 The appellants argue that the State program will not in fact reimburse the participant for all work-related expenses. They contend, for example, that the State will not pay for additional cold-weather or personal grooming items required because of the need to go to work. Although the State's *PSWOP Policy and Procedures* at 8, does not clearly delineate the types of expenses for which reimbursement will be granted, the State must make provision for payment of "any expenses reasonably related to the earning of income," since HEW has not explicitly or impliedly waived § 402(a)(7) of the Social Security Act, 42 U.S.C. § 602(a)(7), for the PSWOP program. See HEW Handbook of Public Assistance Administration, pt. IV, § 3140.1 (1964); *cf. Connecticut State Dep't of Public Welfare* v. *HEW*, 448 F.2d 209, 216-17 (2 Cir. 1971).

Failure to accept a justifiable referral or to participate properly after such a referral "without good cause" is a ground for termination of assistance, 18 N.Y.C.R.R. § 385.6. Upon request a fair hearing must be granted prior to termination, but if the recipient has not accepted the referral or has not continued to participate in the program and then receives an adverse determination at the hearing, a thirty-day suspension of benefits is mandated even though the recipient agrees to immediate compliance. See 18 N.Y.C.R.R. § 385.7.

The Incentives for Independence (IFI) demonstration project has four components: (1) a combination of two public service employment programs—PSWOP and the Emergency Employment Act (EEA) Public Service Employment Program—for adults unable to find regular employment; (2) an earnings exemption; (3) work motivation for school youth through participation in community work projects; and (4) a counseling service for the parents or caretakers of truant children. The project covers approximately 2.5% of the state's AFDC and Home Relief[5] recipients and will be conducted in three areas—a welfare center in New York City (Bay Ridge), a suburban county (Rockland), and a rural county (Franklin)—all of which are contained in or are coextensive with areas in which PSWOP will function.

Appellants also contend that the State Dep't of Social Services, Administrative Letter 72 PWD-121, Aug. 10, 1972, limits the allowance for lunch expenses to $1.00 per day and the monthly allowance for transportation and lunches to $40.00 per month. But the letter seems to have been addressed only to changes in public work projects for employable Home Relief recipients and not to PSWOP or IFI. See 18 N.Y.C.R.R. § 385.10(a), (e)(5); n.5 *infra*.

5 Home Relief is a state program of public welfare for families not eligible for federally funded assistance. See N.Y. Soc. Serv. Law §§ 157-58 (McKinney Supp. 1972). There is no indication that the appellants are attacking that part of the IFI program which affects Home Relief recipients.

As with PSWOP, all nonworking employable recipients will be required to participate in counseling, to report for job interviews and to accept work or training if offered, and no recipient will be considered employable unless a satisfactory child-care plan is available. Individuals in IFI districts can be assigned to PSWOP jobs if employment or training programs in the regular economy are unavailable, and their work obligations and benefits will be identical to those of other individuals in PSWOP programs, except that the sanction for noncompliance in IFI districts is a flat $66 per month reduction in assistance until the individual complies. A limited number of recipients in IFI districts, however, will be assigned to "public service employment" jobs, subsidized by EEA funds, which will pay the higher of the minimum wage or the prevailing wage for persons in similar public occupations. Unlike PSWOP workers, employees in public service employment will work full-time and be paid full wages. Participants will receive workmen's compensation, health insurance, unemployment insurance, and all other fringe benefits conferred on employees of the same employer; their work conditions and promotional opportunities will also be the same as those of regular employees.

A certain portion of the wages paid in these public service employment jobs will be ignored when determining the recipient's eligibility for a supplementary welfare assistance grant. This "income disregard," which differs from that normally mandated by the federal government for AFDC recipients in regular employment, see § 402(a)(7), (8) of the Social Security Act, 42 U.S.C. § 602(a),(7), (8), by lowering the income level at which supplementary assistance payments terminate,[6] will be applied in IFI districts

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6 Under the federal formula, the first $30 per month of income earned in regular employment of the balance are exempt. All expenses incident to employment are then also disregarded. Under the IFI formula, the

to all AFDC and Home Relief recipients in public service employment or in regular employment.[7]

Furthermore, the children of families receiving AFDC or Home Relief in IFI districts who are 15 years of age and attending school full-time (and are not otherwise ineligible)[8] are required to participate in "Work Motivation for Youth." This program will require the child to work for up to six hours semi-monthly during the school year and up to sixty hours during the summer vacation. Participants will be paid $1.60 per hour for no more than 150 hours per year. Refusal to comply will result in a $6.25 semi-monthly reduction in the family grant, unless the parent certifies that he or she is trying to get the child to cooperate. Also, when a child fails regularly to attend school, the parent or caretaker in a family receiving assistance must accept counseling services or face a reduction in the grant.

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cost of day care is exempted as is the first $60 per month of expenses: one-third of the remainder up to 150% of the federal payments level is then exempted, and one-quarter is exempted thereafter. The IFI formula will generally yield smaller exemptions because under the federal formula (1) *all* expenses incident to employment are exempted, (2) the one-third exemption is uniformly applied to the balance, and (3) the exemption for expenses incidental to employment is taken *after* one-third of the gross income has been exempted. See *Connecticut State Dep't of Public Welfare* v. *HEW*, 448 F.2d 209, 214-15 (2 Cir. 1971).

7 Currently employed AFDC recipients in IFI districts will not be subject to the revised income disregard.

Under existing state law, there is a $30 per month income disregard for Home Relief recipients. N.Y. Soc. Serv. Law § 159-b (McKinney Supp. 1972). Home Relief recipients in IFI districts will benefit from an increased income disregard. See n.6 *supra*.

8 The child would not be eligible if, for example, he or she were required to participate in a supplementary or remedial educational program or were required at home for family care.

II. *The Processing of the Projects by the HEW, and the Proceedings in this Action.*

The New York legislature originally provided for a work relief program for AFDC recipients in April 1971. See N.Y. Soc. Serv. Law § 350-k (McKinney Supp. 1972). In a letter written soon after enactment to George K. Wyman, then Commissioner of the State Department of Social Services, HEW stated that the work program was inconsistent with several federal requirements and could not receive federal funds. In August 1971, following discussions with President Nixon on welfare reform, Governor Rockefeller announced that New York would seek approval from HEW under § 1115 of the Social Security Act, 42 U.S.C. § 1315,[9] for an experimental work relief project, thus permitting a temporary waiver of certain federal requirements. New York submitted formal applications for the PSWOP and IFI projects on September 9 and 10, 1971, which were then revised and resubmitted on November 11, 1971.

On November 24, 1971, HEW approved both projects, contingent, however, on submission by New York of further information before December 31, 1971. The conditions called for revised and more detailed budgets, further information on personnel administration, and, with respect to IFI, requests for further waivers and rather extensive additional information on proposed implementation, including "a plan for general project activities (screening, referral, monitoring, etc.)." New York forwarded on Decem-

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9 In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of . . . part A of subchapter IV of this chapter [the AFDC program], in a State or States—

(a) the Secretary may waive compliance with any of the requirements of section . . . 602 . . . of this title, as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project . . . .

ber 28, 1971, letters not appearing in the record, which purported to meet HEW's conditions. On February 9 and 10, 1972, HEW responded, finding many of the budgetary specifications to be inadequate and requiring complete budgetary submissions as well as additional information on numerous operational aspects "prior to implementing the project." State officials, on February 22, 1972, provided HEW with two two-page letters responsive to some but—particularly as to IFI—not all of HEW's requests. The letters requested permission to begin implementation April 1, 1972.

Before any HEW responses, the District Court for the District of Columbia, enforcing an agreement between HEW and the National Welfare Rights Organization in settlement of an earlier suit brought under the Freedom of Information Act, on March 13, 1972, required HEW to withdraw its November 24, 1971, approval and to allow the Center on Social Welfare Policy and Law thirty days to examine the proposed projects and present an analysis to HEW.[10] On April 11, 1972, the Center sent HEW and NYSDSS an extensive letter prepared by Adele Blong, who has given the individual and organization plaintiffs superb representation, analyzing what it considered the defects of IFI and PSWOP and urging HEW not to authorize the programs. NYSDSS responded in two undated letters to HEW, one identifying the many objections raised by the Center and the other seeking to answer them.

Without having received further information from New York, the HEW staff prepared "Action Memoranda" which were presented to the Secretary on May 31, 1972, recommending approval of the projects but detailing certain necessary information still lacking from New York. On June

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10 *National Welfare Rights Organization* v. *Richardson*, —— F. Supp. —— (Civ. 2178-71, D.C.C. March 13, 1972).

1, 1972, the Secretary approved the application for section 1115 demonstration projects, but again required further information prior to implementing each project. The further information requested included, *inter alia*, evidence of the availability of child care facilities, details of the fair hearing procedures to be used, and a statement that all work-related expenses would be reimbursed. On June 14 and 27, 1972, the State sent letters containing assurances of compliance and information concerning, respectively, PSWOP and IFI. Two weeks later, apparently without further official communication between HEW and NYSDSS, the state officials notified local welfare agencies to begin implementation of the projects on August 1, 1972.

The complaint herein was filed on August 2, 1972. Upon application by the plaintiffs, the district court, on August 4, issued an order temporarily suspending the HEW's approval of the projects to the extent that it permitted imposition of loss of benefits as a sanction and restraining the state defendants from imposing any sanction for nonparticipation; at the hearing Judge Bauman extended the stay pending resolution of the motion for a preliminary injunction.[11] On October 16 the court rendered an opinion. Judge Bauman held that the welfare organizations lacked standing and that the City of New York (and implicitly also Commissioner Sugarman) had standing to raise only what are hereafter referred to as the statutory claims. He found that all claims of constitutional violation were insubstantial, that federal jurisdiction nevertheless existed by virtue of § 10 of the Administrative Procedure Act, 5 U.S.C. § 702, but that the statutory claims had not been shown to be meritorious. Accordingly, he denied the motion for a temporary injunction. Another panel of this court denied

11 The state officials were permitted to continue the projects on a voluntary basis but elected not to do so on the ground that projects so restricted would not yield the desired information.

a further stay, except for several days to allow appellants to petition the Supreme Court. On November 16, 1972, after a hearing in chambers, Mr. Justice Marshall ordered that the stay be continued pending argument before this court, and directed that the appeal be heard on an expedited basis. We continued the stay pending decision. Unhappily the variety and difficulty of the questions raised have prevented our rendering this as soon as we should have wished.

III. *Standing.*

As is usual in welfare cases, before coming to the merits we must weave our way through a maze of problems relating to standing and jurisdiction. The complaint raised both constitutional and statutory claims, which we state at this point only insofar as necessary to an understanding of the preliminary issues. It alleged, as against the state defendants, that because the two projects were imposed on only a portion of those eligible for AFDC benefits, these defendants violated the equal protection clause of the Fourteenth Amendment, and that the New York statutes with respect to hearings for suitability for the projects and the failure to develop specific standards and procedures applicable to the participants violated the due process clause.[12] The most important statutory claims were that the projects were so basically inconsistent with the Social Security Act as to lie beyond the power of approval of demonstration projects vested in the Secretary of HEW by 42 U.S.C. § 1315; that the record before the Secretary was inadequate

12 The complaint alleges that the hearing provisions violate the due process clause of the Fifth, not the Fourteenth, Amendment. Although the approval process of HEW might bring the matter within the purview of the Fifth Amendment, we assume—since the briefs were clearly directed to this point—that reference to the Fourteenth Amendment was intended.

to warrant such approval under the standards laid down in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); and that the approval was inadequate because of its failure to waive compliance with the work incentive (WIN) provisions of the Social Security Act, 42 U.S.C. § 602(a)(19). We shall consider the standing of each set of plaintiffs to raise each type of claim.

At first blush it would seem almost too clear for argument that relief recipients within the general class at which a work program is aimed would have standing to challenge it on both constitutional and statutory grounds. Compare *Sierra Club* v. *Morton*, 405 U.S. 727, 732 (1972); *Trafficante* v. *Metropolitan Life Ins. Co.*, U.S. (1972), 41 U.S.L.W. 4071.[13] The state defendants contest this on the basis that, except for Hyacinth Cadogan, none of the plaintiffs has been found to be employable and, on their own allegations, will not be found to be. We are not at all sure that this is an answer; the threat of compulsory enrollment would seem enough, except perhaps when there was no rational basis for fear. However, it is unnecessary to pursue the subject since, if Mrs. Cadogan has standing,[14] it is immaterial whether the other individual plaintiffs have this.

Relying on *Sierra Club* v. *Morton, supra*, 405 U.S. 727, the district court held that the seven welfare organizations lacked standing. Appellants contend that the judge read the decision too expansively. They point to passages in the

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13 It should be clear that we are here discussing only the issue of *standing; jurisdiction* with respect to the statutory claims is another matter because of the $10,000 amount requirement of 28 U.S.C. § 1331.

14 We are unpersuaded by the state defendants' argument that Mrs. Cadogan has suffered no damage from participating in PSWOP by working mornings in the New York City Hall library sorting books for the few days before PSWOP was temporarily restrained. If she could not lawfully be compelled to do the work she is doing, that is damage enough.

Court's opinion emphasizing that "[t]he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes" by the development the Club sought to challenge, 405 U.S. at 735; pointing out that "[t]he Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a 'public' action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a 'representative of the public' ", *id.* at 736; and suggesting, *id.* at 735-36 n.8, that the Club might amend its complaint to show injury to members. The complaint here alleges that members of at least some of the organizations are potential subjects of the projects and that other members will suffer from a worsening of the overall welfare administration situation if the projects are implemented. We agree that this suffices to give these organizations standing under the general federal question statute, 28 U.S.C. § 1331, but see fn.13 *supra*, or, if it were applicable, 28 U.S.C. § 1361.

The question whether the welfare organizations have standing under the civil rights statute, 42 U.S.C. § 1983, and its jurisdictional implementation, 28 U.S.C. § 1343(3), is more difficult. Section 1983 confers a cause of action on "any citizen of the United States or other person within the jurisdiction thereof" who has been deprived under color of state law "of any rights, privileges, or immunities secured by the Constitution and laws." Neither this language nor the history recently reviewed in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), suggests that an organization may sue under the Civil Rights Act for the violation of rights of members. All of the justices who formed the majority in *Hague* v. *CIO*, 307 U.S. 496, 514, 527, 532 (1939), seem to have held the contrary, and this portion of *Hague* was not overruled by *Lynch*. We do not

regard the line of decisions beginning with *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958), and continuing through *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 n.9 (1960), and *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296 (1961), to *NAACP* v. *Button*, 371 U.S. 415, 428-29 (1963), as having altered that principle in any way helpful to the organization plaintiffs here. The statements in those opinions that the organization has standing to assert the rights of its members were made in the context of a claim of abridgment of the constitutional right of association; indeed, in all but the last case, the right to refrain from disclosure of membership because of the adverse effect of disclosure on both the association and the members was the very point at issue. See *NAACP* v. *Alabama ex rel. Patterson*, *supra*, 357 U.S. at 459-60. While the Court said in *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 739, "[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review," followed by a citation to *Button*, we think this must be limited to the issue there *sub judice*, standing to seek review of the action of federal officers, and not as broadening the standing of organizations as plaintiffs under the Civil Rights Act. See *National Welfare Rights Organization* v. *Wyman*, 304 F. Supp. 1346, 1348 (E.D.N.Y. 1969); *Crossen* v. *Breckenridge*, 446 F.2d 833, 839 (6 Cir. 1971).

The complaint asserted that implementation of the projects for a year would impose additional administrative costs on New York City, which Administrator Sugarman estimated to aggregate a net amount exceeding $2,500,000 per annum. Although the state defendants contend that this figure is excessive, they do not dispute that the City will be confronted with substantial added costs. The district court held that the City had standing to assert the statutory claims against the federal defendants, as is not

here disputed, but that, under *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933), it had no standing to assert constitutional claims. While this may be true with respect to New York City itself, we see no sufficient answer to the argument that *Board of Education* v. *Allen*, 392 U.S. 236, 241 n.5 (1968), requires a recognition of standing on the part of plaintiff Sugarman to assert constitutional claims. Like the school board members in that case, he is faced with what he deems a conflict between his oath to support the United States Constitution and his duty under state law to carry out the New York projects. While *Allen* was an appeal from the New York Court of Appeals, Mr. Justice White said, 392 U.S. at 241 n.5, that the conflict there visited upon school board members gave them a "personal stake in the outcome" of the litigation, citing *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). If they thus had standing to press a constitutional claim in the Supreme Court, although their pocketbooks were in no way affected, we fail to see why Sugarman does not have similar standing to assert constitutional claims in the district court, as the citation of *Baker* v. *Carr*, an action begun in a federal district court, with jurisdiction predicated on 28 U.S.C. § 1343(3), would imply. We also are by no means certain that the reasoning of *Williams*, that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator," 289 U.S. at 40, applies to a claim by a city that federal action violates the Fifth Amendment. The state, not the federal government, has "created" the city. While a city is not a citizen entitled to privileges and immunities under section 2 of Article IV, or section 1 of the Fourteenth Amendment, we would not consider that the issue whether, for some purposes, such as a claim of dis-

criminatory treatment affecting its finances, it might not be a "person" entitled to protection under the Fifth Amendment was necessarily foreclosed by *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966), although it may be difficult to see how a city can be a "person" if its progenitor is not. On the other hand, a city would clearly lack standing to raise due process claims (*e.g.*, lack of fair hearing) relating to its citizens.

The upshot of all this is:

1) At least plaintiff Cadogan has standing to raise both constitutional and statutory claims.

2) At least some of the welfare organizations have standing to raise statutory claims.

3) The City has standing to raise statutory claims, and Sugarman has standing to raise both constitutional and statutory claims. The City lacks standing to assert constitutional claims against the State; we need not decide whether it is totally deprived of standing to raise constitutional claims against the federal defendants.

IV. *Jurisdiction*

Such difficulty as exists with respect to jurisdiction stems from the $10,000 jurisdictional amount requirement in the general federal question statute, 28 U.S.C. § 1331, and the ruling in *Snyder* v. *Harris* and the companion case of *Gas Service Co.* v. *Coburn*, 394 U.S. 332, 335 (1969) forbidding aggregation of the class action claims save in the two circumstances there stated.[15]

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15 As in *Almenares* v. *Wyman*, *supra*, 453 F.2d at 1083 n.11, we again do not find it necessary to pass on the correctness of *Bass* v. *Rockefeller*, 331 F. Supp. 945 (S.D.N.Y.), *appeal dismissed as moot*, 464 F.2d 1300 (2 Cir. 1971) with respect to aggregation. *See Note, Federal Jurisdiction over Challenges to State Welfare Programs*, 72 Colum. L. Rev. 1404, 1428-32 (1972).

Some avenues of escape proposed by plaintiffs must be rejected. The Social Security Act is not an "Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States," 28 U.S.C. 1343(3), so as to remove the jurisdictional amount requirement for the statutory claims. *McCall* v. *Shapiro*, 416 F.2d 246, 249 (2 Cir. 1969): *Almenares* v. *Wyman*, 453 F.2d 1075, 1082 n.9 (2 Cir 71), *cert. denied*, 405 U.S. 944 (1972). Neither is ' Social Security Act an "Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies" within 28 U.S.C. § 1337. *Id.* Finally, despite the breadth with which we have read 28 U.S.C. § 1361, see *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371, 374-75 (2 Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Cortright* v. *Resor*, 447 F.2d 245, 250-51 (2 Cir. 1971), *cert. denied*, 405 U.S. 965 (1972), we cannot properly characterize this as an "action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

We are also unwilling to follow the district court in avoiding the jurisdictional amount problem with respect to the statutory claims by reliance on § 10 of the Administrative Procedure Act, 5 U.S.C. § 702, as an independent grant of jurisdiction. The Supreme Court has not squarely faced this recurring problem. Professor Davis, Administrative Law Treatise, § 23.02 (Supp. 1970), cites *Rusk* v. *Cort*,[16] 369 U.S. 367 (1962) and *Flast* v. *Cohen*,

16 Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 329 n.76 (1967), point out that the only explicit discussion of jurisdiction—in Justice Brennan's concurring opinion, 369 U.S. at 380—"may have intended another nuance of the term 'jurisdiction,'" since his discussion applied equally to the APA and to the Declaratory Judgment Act—the latter of which clearly does not grant independent jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum*

392 U.S. 83 (1968), as having settled that § 10 of the APA constituted an affirmative grant, and it is indeed hard to see how else jurisdiction could have existed. However, neither opinion adverted to the issue, and it is impossible to believe that the Court would have disposed of so important a question *sub silentio*.[17] Also, the final paragraph of *Oesterreich* v. *Selective Service Board*, 393 U.S. 233, 239 (1968), looks to us like a reference to jurisdictional amount, although Professor Davis ingeniously argues against this, § 23.02 at 792-93. See also *Breen* v. *Selective Service Local Board*, 396 U.S. 460 (1970). Our own decisions are similarly inconclusive. While *Cappadora* v. *Celebrezze*, 356 F.2d 1, 5-6 (2 Cir. 1966), assumed that § 10 of the APA was a jurisdictional grant, *Wolff* v. *Selective Service Board*, 372 F.2d 817, 826 (2 Cir. 1967), indicated that jurisdictional amount must be met in an action against federal officers. In *Mills* v. *Richardson*, 464 F.2d 995, 1001 n.9 (2 Cir. 1972), we said that the question whether the APA was an independent jurisdictional grant had not been determined in this circuit. The problem is not an easy one, and decision will be rendered unnecessary if Congress should accept the sound recommendation of the Administrative Conference, 1 Recommendations and Reports of the Administrative Conference of the United States 169 (1970), that, whatever may be done generally with respect to jurisdictional amount in federal question cases, the time has

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Co., 339 U.S. 667 (1950). Indeed, the majority opinion, 369 U.S. at 372, focuses its discussion on the policies behind the Declaratory Judgment Act. Professor Byse and Mr. Fiocca conclude, 81 Harv. L. Rev. at 330, that while "the question remains open," "the Supreme Court should hold that section 10 confers jurisdiction." See, for a conclusion similarly based on considerations of policy, Jaffe, Judicial Control of Administrative Action 165 (1965).

17 Professor Davis also cites *Leedom* v. *Kyne*, 358 U.S. 184 (1958), but that action clearly fell within 28 U.S.C. § 1337 even though the draftsman of the complaint had not cited it.

long since come to adopt the proposal, made by Professor Herbert Wechsler when the Judicial Code was last revised, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 211 (1948), that jurisdictional amount has no place in actions against federal officers.

Combining those claims in which we have found standing with this court's liberal application of the doctrine of pendent jurisdiction, *Astin-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F.2d 627 (2 Cir. 1971); *Leather's Best, Inc.* v. *S.S. Moormaclynx*, 451 F.2d 800, 809 (2 Cir. 1971); and *Almenares* v. *Wyman, supra*, 453 F.2d at 1083-86, suffices to sustain jurisdiction over both types of claims against both sets of defendants. Under 28 U.S.C. § 1343(3) the district court had jurisdiction of Mrs. Cadogan's and Sugarman's constitutional claims[18] against both sets of defendants. Under 28 U.S.C. § 1331 it had jurisdiction over the City's statutory claim against both sets of defendants since the City's allegation that it had more than $10,000 at stake was clearly substantiated. The other claims have a "common nucleus of law and fact" with these. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Under these circumstances it would be absurd to fragmentize this litigation, especially when, as in *Almenares*, all the claims are federal in nature.

V. *The Statutory Claims*

As instructed by *Thorpe* v. *Housing Authority of the City of Durham*, 386 U.S. 670 (1967), *King* v. *Smith*, 392 U.S. 309 (1968), and other cases, we begin by considering the claims that, for a variety of reasons, the approval of the Secretary of HEW was ineffective to authorize the

18 As will later be shown, at least one of these, the due process claim with respect to hearings, was substantial.

departures from requirements of § 402 of the Social Security Act, 42 U.S.C. § 602, concerning state plans for aid and services to needy families with children which PSWOP and IFI concededly involve.

We note preliminarily that consideration of these claims, like those in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), takes us into a type of judicial review considerably more difficult to define and exercise than traditional review of administrative action. We have here no adversary hearing, no record, no statement of the grounds for the Secretary's action,[19] except as these may be inferred from the papers on which he acted and from the largely unhelpful documents prepared specifically for this litigation.[20] While we shall follow the guidelines helpfully stated in *Overton*, 401 U.S. at 416-17, so far as applicable, we find more merit than do the plaintiffs in the defendants' position that, purely legal issues apart, it is legitimate for an administrator to set a lower threshold for persuasion when he is asked to approve a program that is avowedly experimental and has a fixed termination date[21] than a proposal, like that in *Overton Park*, which is irreversible. Moreover, *Overton Park* dealt with a situation where an administrator was required to make two highly

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19 The task of reviewing courts would be greatly facilitated by such statements, however brief and informal.

20 As noted in *Overton Park, supra*, 401 U.S. at 419, such affidavits are "merely 'post hoc' rationalizations" for administrative action, and cannot be given great weight.

21 The project requests were for three-year programs for PSWOP and a one-year program for IFI. The June 1, 1972, approval letter from HEW for PSWOP granted approval for one year and provided that requests for approval to continue for a second year were to be made on the basis of an evaluation of the first nine months of the program's activities. In addition, the HEW Handbook of Public Assistance Administration § 8240 provides for rescission of approval at any time during a project's life.

specific determinations on the basis of explicit, legislatively prescribed considerations, rather than reach an over-all "judgment". In saying this we are not insensitive to the impact these projects may have on the lives of thousands of people, many of whom are in "brutal need," *Goldberg* v. *Kelly*, 397 U.S. 254, 261 (1970). Yet the Secretary could properly take into account the growing antagonism to the welfare system and the possibility that, unless the public is satisfied that every reasonable effort is being made to induce employable recipients of assistance to work, pressure on governors and state legislators might cause the level at which needs are met to be reduced well below New York's 90%, with far greater ultimate hardship than these projects may entail.

Appellants claim that the Secretary exceeded his authority under 42 U.S.C. § 1315 in two respects. The first is that there was no basis on which the projects could be deemed "likely to assist in promoting the objectives" of the specified parts of the Social Security Act. Appellants argue that the objective of federal participation in the AFDC program, as stated in 42 U.S.C. § 601, is to assist the states "to furnish financial assistance and rehabilitation and other services" which will encourage "the care of dependent children in their own homes or in the homes of relatives"—not to force their parents or relatives, or themselves, to work.

This takes too narrow a view of Congress' purpose. To begin, Congress must have realized that extension of assistance to cases where parents, relatives or the child himself was capable of earning money would diminish the funds available for cases where they were not. While common sense would lead to that conclusion, one does not have to resort to that useful tool. As shown in *King* v. *Smith*, *supra*, 392 U.S. at 327-29, the committee reports

and floor debates incident to enactment of the AFDC program as part of the Social Security Act of 1935, 49 Stat. 620, are full of references to the concept that the ideal was a situation in which the family "breadwinner" would win the needed bread and that public assistance was a solution only for those children whose natural "breadwinner" was dead, incapacitated, or continually absent. Beyond that, 42 U.S.C. § 601 itself states as one of the purposes of the program "to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." Further, Congress has on a number of occasions indicated its view that such "capability" is enhanced by projects enabling the parents or relatives to work. The 1935 Act contained a section, 409, 42 U.S.C. § 609, for community work and training programs quite similar to those here at issue; while that section was repealed in 1968, it was replaced by the Work Incentive (WIN) Program, 42 U.S.C. §§ 630-43. The WIN program is a work-relief program virtually identical in scope and design to New York's PSWOP;[22] in fact, with respect to wage minimums PSWOP and especially IFI, which explicitly provides that participants shall receive the same fringe benefits as their coworkers, are more advantageous to the participant than WIN.[23] In the face of Congress' expression of its belief in

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22 The May 31, 1972, approval letter for PSWOP, and also counsel for the state appellees at oral argument, indicated that the need for these new projects arose not from deficiencies in the scope or structure of WIN, but from the limited extent of its implementation in New York. Apparently the state preferred to have projects in which the initiative for implementation rested in its own hands.

23 Counsel for the plaintiffs urge that, in addition to possible wage differentials, participants in IFI and PSWOP will be disadvantaged relative to participants in WIN because "WIN guarantees the availability of a full range of services designed to insure . . . that the family will be aided in making the necessary adjustment . . ." While WIN reg-

the possible efficacy of this type of program, most recently reaffirmed in the 1971 amendments to the WIN program, 85 Stat. 803, appellants' arguments that the New York programs are contrary to the objectives of AFDC are clearly misdirected. Although the stereotype envisioned by Congress was doubtless the situation where the male member of the family wins the bread, the work relief concept is broad enough to cover cases where a female family member is capable of contributing to the family's support, provided that the children are properly cared for during her absence from the home. Indeed, the eligibility requirements of the WIN program do not distinguish between male and female relatives.

Next in breadth is appellants' contention that 42 U.S.C. § 1315 does not permit the Secretary to waive any requirement of § 602 which might result in the curtailment or denial of assistance.[24] Conceding that on its face 42 U.S.C. § 1315 permits waiver of the basic requirement that aid be furnished "to all eligible individuals" within the state, 42 U.S.C. § 602(a)(10), appellants rely on bits of legislative history which, in their view, demonstrate that the sole purpose of § 1315 was to permit experiments in administrative techniques free from the requirement of 42 U.S.C.

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ulations, 45 CFR § 220.35(b)(2)(i) make a wide range of supportive services, listed in *id.* § 220.18 *et seq.*, available to AFDC recipients, the WIN program in no way guarantees their availability. Indeed, the HEW WIN Handbook § 80.6 (1972) states that the only service which must be provided before certification under 42 U.S.C. § 602(a)(19) is a medical examination, and that the only service which must be available before entering a work project is child care. Both these services appear to be elements of the New York projects in equal measure and with parallel provisions for insuring adequacy.

24 We refer here to the imposition of conditions for AFDC eligibility in addition to those included in the Act which may lead to suspension or termination based on refusal to participate. As indicated above, n.4, we do not envision any loss in the amount of assistance by participants.

§ 602(a)(1) for statewide uniformity. If that was the sole purpose, it would be hard to understand why the waiver authority was so extensive. In fact, the passages in the Committee reports on which appellants rely, S. Rep. No. 1589, 87th Cong., 2d Sess. 19-20, 1962 U.S. Code Cong. & Adm. News 1943, 1961-62 (1962); H.R. Rep. No. 1414, 87th Cong. 2d Sess. 24 (1962), do not carry the day for them; the Senate Report says that "[t]he public assistance titles of the Social Security Act contain a number of requirements on the States for approval of a State plan" which "often stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients," and cites the statewide uniformity requirement only as "one example." We likewise find unpersuasive the arguments that the examples given in the Congressional hearings and in the HEW Handbook of Public Assistance Administration issued on its enactment concerned the development of new services and improving administration. This is rather a case, in Mr. Justice Frankfurter's phrase, "for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States,* 350 U.S. 366, 374 (1956). The limitation, and the only limitation imposed on the Secretary was that he must judge the project to be "likely to assist in promoting the objectives" of the designated parts of the Social Security Act. *California Welfare Rights Organization* v. *Richardson,* F. Supp. (N.D. Calif. 1972).

This bring us to the question whether the Secretary had a rational basis for determining that the programs were "likely to assist in promoting the objectives" of Part A of Subchapter IV. The Action Memorandum on PSWOP informed the Secretary that the New York Department of Social Services expected the following results:

A. Decreased costs of public assistance.
B. Increased self-support or self-care of recipients.
C. Increased initiative of recipients.
D. Increased self-respect of recipients.
E. Increased community participation.
F. Improved public attitude toward public welfare.

The Action Memorandum on IFI said:

> The State anticipates that "Incentives for Independence" will increase self-support or self-care of present recipients. The impact of the project on the behavior and attitudes of welfare recipients will be analyzed. The State also wishes to determine whether such a program is administratively feasible or efficient, and whether it modifies the attitude of the public toward welfare. The objectives of the project include:
>
> 1. Employment of able-bodied adults.
> 2. Development and use of employability skills in young adults.
> 3. Education and motivation of school-age children.

It is impossible to deny that attainment of these goals, or even of some of them, would meet the test of 42 U.S.C. § 1315. Appellants' criticisms, apart from those already rejected, are rather that the programs simply cannot in fact achieve the objectives or any of them. In its comprehensive letter submitted to the Department and transmitted to the Secretary along with the Action Memorandums, the Center on Social Welfare Policy and Law criticized the projects on numerous grounds, among others, alleged differentials between the payments to the partici-

pants and those to regular employees,[25] the coercive effects of the programs, lack of adequate standards with respect to child care, the absence of specificity concerning the types of jobs to which welfare recipients will be assigned and the standards that would justify refusal to participate, the unlikelihood that experience in the types of jobs indicated as likely candidates would qualify a welfare recipient for employment in the general economy, and the improbability that many such jobs will be available.[26] It also developed other possible and less harsh means for improving public attitude toward the welfare program, *e.g.*, by demonstrating how large a proportion of the recipients

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25 In light of the terms of the program we do not understand how such differentials could occur except for the point that PSWOP participants will not share in "the extras or fringe benefits earned by regular employees." We are not told what such extras or fringe benefits would be in the case of public employees in so early a stage of employment. In any event we do not believe that the absence of such benefits violates congressional policy in the welfare area. 42 U.S.C. § 609(a)(1)(B), now repealed, required only that the rates of pay be "not less than the minimum rate (if any) provided by or under State law for the same type of work and not less than the rates prevailing for similar work in the community," the same phrase used in PSWOP and IFI. We have found no regulation reading the language of § 609(a)(1)(B) to include fringe benefits. The successor to § 609, the WIN program, 42 U.S.C. § 633(e)(4), is even less favorable to welfare recipients; it requires only that "[n]o wage rates provided under any agreement entered into under this subsection shall be lower than the applicable minimum wage for the particular work concerned." The Work Incentive Program Handbook, § 9360(2)-3 adds that if no minimum wage is applicable, "the wage must not be substantially less favorable than the wage normally paid for similar work in that labor market, but in no event, less than three-quarters of the Federal minimum wage." Again, nothing is said expressly pertaining to fringe benefits, and we have been cited to no practice for their inclusion. It must also be realized that participants in the programs here attacked receive substantial benefits in the way of free child care and assurance of immediate resumption of assistance not provided for the ordinary worker.

26 The State has indicated that it will require local departments of social services in PSWOP areas to develop a "sufficient number and variety" of projects to insure that all unemployed employable AFDC recipients receive jobs. See PSWOP Policy and Procedures, at 6.

were in fact unemployable and the absence of employment opportunities. As indicated, the State submitted two memoranda, which were also transmitted to the Secretary, one identifying the objections and the other endeavoring to answer them, an endeavor that was successful at least to a substantial degree.

We are satisfied that the materials before the Secretary sufficed for "a consideration of the relevant factors" by him and that there was no "clear error of judgment" on his part. *Overton Park, supra*, 401 U.S. at 416. While the Center's arguments were impressive, they were to some extent contradictory—that the programs would have a massive adverse effect on welfare recipients, and that there were so few employables and employment opportunities that the programs could not prove anything. Ascertainment by actual demonstration whether the latter claim is true would itself be a legitimate objective. Moreover, as previously indicated, we think the Secretary could properly give weight to the fact that the programs were of limited duration and would remain under the on-going supervision (with the power to terminate approval) of HEW. Experience will be the best test of the reality of appellants' fears, and a strong showing would be required to demonstrate that the Secretary could not properly subject them to it. In this respect, appellants ask us to administer a prophylaxis against possible adverse results from the Secretary's determination far beyond the limited review outlined in *Overton Park*. Whether we would have been convinced by the State's case if we had been in the Secretary's shoes is immaterial. "The court is not empowered to substitute its judgment for that of the agency." *Overton Park, supra*, 401 U.S. at 416.

Still another set of objections by the individual and welfare organization appellants is that the Secretary had

inadequate information concerning many details. However, the material furnished by the State in justifying the programs and applying for approval[27] adequately covered the policy, budgetary and logistical essentials, and the statute —speaking in terms of an otherwise unfettered "judgment" —does not require that, before the Secretary approves an experiment, every i must be dotted and every t crossed. A more important objection is that the material before the Secretary affirmatively showed the incapacity of state and local welfare and employment agencies to take on this added task. New York City eagerly joins in claiming it cannot do the job the State has assigned it. Appellants call attention to the phrasing of a letter from HEW's Assistant Administrator, Research and Administrations, to the Center saying only:

> We have no reason at this time to assume that New York will be unable to carry out the provisions of the demonstrations

and argue that this is a far cry from a finding that the ability exists. But this case does not involve "adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 554(a), to which alone the requirement of findings, 5 U.S.C. § 557 (c), applies. Moreover, the same letter continues:

> A major purpose of the evaluation will be to assess the administrative feasibility of IFI and PSWOP.

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27 In contrast to *Citizens to Preserve Overton Park, supra*, 401 U.S. at 412 n.28, we find no indication in the legislative history behind § 1315 that "the Secretary is not to limit his consideration to information supplied by state and local officials but is to go beyond this information and reach his own independent decision"—at least if this were read to require him to make a further field investigation rather than simply to consider the comments of objectors and the views of his own staff.

If, for example, the programs succeeded in some districts and failed in others, this might reveal whether a difference in the quality of administration was the reason and whether increased expenditure on or better organization of administration was essential. Only if the materials showed such administrative incapacity as to negate any appreciable possibility of success would the Secretary's approval be arbitrary and capricious. This was not the case. Rather, as indicated in our summary of HEW's review, *supra*, HEW, as conditions to implementing the programs pursuant to its November 1971, and June 1972 approvals, demanded assurances of the State's capacity to perform, with which it was presumably satisfied.[28]

Appellants' final statutory claim[29] is that the Secretary's action is ineffective because it did not expressly waive compliance with 42 U.S.C. § 602(a)(19), which requires every State plan to provide for the prompt referral[30] of certain

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28 Plaintiffs argued also that a provision in HEW's Handbook of Public Assistance Administration directing that "[a]pplications [for § 1315 approval] will be appraised with respect to the clarity of the plan and the ability of the agency to provide for methods or organization, administration, and staffing which holds reasonable promise of carrying out the project effectively" imposes a stricter standard to which HEW must be held. See *Cappadora* v. *Celebrezze*, *supra*, 356 F.2d at 6. However, in view of our discussion of the permissible purposes of the projects, in particular the projects' usefulness in determining local administrative capabilities, defendants have not unreasonably deviated from their own rules.

29 In their complaint, plaintiffs also raised HEW's failure to waive the provisions of 42 U.S.C. § 602(a)(7) and (8) as to PSWOP. These sections would appear to require any AFDC program to disregard certain income received by recipients, and PSWOP contains no provision for such disregard. However, plaintiffs in their brief to this court specifically note that at the preliminary injunction stage they are raising only the failure to waive section 602(a)(19) and prefer to raise the other claims of inadequate waiver at the trial. But see footnote 4 *supra*.

30 42 U.S.C. § 602(a)(19) as in effect at the time of the Secretary's approval in June, 1972, required "referral" to the Secretary of Labor. The 1971 Amendments to the WIN program, 85 Stat. 802 (December 28,

welfare recipients to the Secretary of Labor for participation in the WIN program. It is not immediately apparent from the language of § 602(a)(19) whether this merely demands such a program, which the New York State AFDC plan has, or outlaws any other state work program, as held by a three-judge court in this circuit in a decision, *Dublino* v. *New York State Department of Social Service*, 348 F. Supp. 290 (W.D.N.Y. 1972), now on appeal to the Supreme Court, consideration of jurisdiction postponed to hearing on the merits, 41 U.S.L.W. 3391 (Jan. 16, 1973); see also *Jeffries* v. *Sugarman*, F. Supp. (S.D.N.Y. 1972), an appeal from which is now pending before this court; *Woolfolk* v. *Brown*, 325 F. Supp. 1162 (E.D. Va. 1971), aff'd 456 F.2d 652 (4 Cir. 1972). If the Supreme Court should reverse or seriously restrict the holding in *Dublino*, appellants' argument would be largely drained of force. However, it would be quite improper for us to endeavor to anticipate the Court's decision, and we think it undesirable to decide an issue now pending before that Court and this if decision can be avoided. We believe it can be.

The "stick" in the WIN program is the provision, 42 U.S.C. § 602(19)(F), whereby individual aid may be reduced (or, in one instance eliminated) whenever an individual has been found by the Secretary of Labor to have refused without good cause to participate in a project established under the program, or has "refused without good cause to accept employment in which he is able to engage which is offered through public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a

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1971), effective July 1, 1972, directed that each AFDC shall register with the state WIN agency, which in turn shall "certify" eligible participants to the Secretary of Labor.

bona fide offer of employment." Although on their face the two latter provisions, the first of which would be here applicable, do not seem to be limited to employment procured through the WIN program, in which event waiver of 42 U.S.C. § 602(a)(19) clearly would not be required here, they appear to have been generally read as limited to persons participating in WIN programs, *see, e.g., Woolfolk* v. *Brown, supra,* 325 F. Supp. at 1169, and we shall assume, without deciding, that this is what they mean. However, there is force in the defendants' contention that the Secretary's waiver of the basic requirement for payment of assistance "to all eligible individuals", 42 U.S.C. § 602(a)(10), includes waiver of any further conditions to eligibility implicit in the program. It is clear, both from the entire context and from specific references in the materials before him, that the proponents and opponents of the projects and the Secretary were well aware that the PSWOP and IFI work programs differed in some respects from WIN; indeed their very purpose was to provide employment for AFDC recipients not participating in a WIN program. It would elevate form over substance to issue a temporary injunction against the operation of these projects until the Secretary went through the formality of adding 28 U.S.C. 602(a)(19) to the list of sections compliance with which was being waived.

VI. *The Constitutional Issues*

We deal first with appellants' claims that the different treatment of the 25% of the State welfare recipients in the areas chosen for inclusion in PSWOP and the 2.5% of such recipients chosen for inclusion in IFI from that accorded welfare recipients in the rest of the State violates the Equal Protection Clause of the Fourteenth Amendment.

Dandridge v. *Williams,* 397 U.S. 471, 484-86 (1970), decided that despite the fact that "the administration of

public welfare assistance . . . involves the most basic economic needs of impoverished human beings," claims of denial of equal protection in the allocation of welfare benefits did not invoke the "strict scrutiny" developed by the Court for equal protection claims where "fundamental rights" were at stake. The Court has since reaffirmed this in *Richardson* v. *Belcher*, 404 U.S. 78 (1971), and *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). As said in the latter case, 406 U.S. at 546-47:

> So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

If the standard of review is as limited as held in *Dandridge*, appellants' equal protection claim does not reach the level of substantiality. However, it has been recently suggested, see Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 17-24 (1972), that the Court is developing a standard more stringent than that limned in *Dandridge* but lower than "strict scrutiny"—whether as a replacement for the "two-tiered equal protection" which many have found unsatisfactory, see *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 177 (1972) (dissenting opinion of Mr. Justice Rehnquist), or as a narrowing of the gap between the tiers. Even if the standard here applicable is "that a statutory classification bear some rational relationship to a legitimate state purpose," *Weber* v. *Aetna Casualty & Surety Co.*, *supra*, 406 U.S. at 172 (Mr. Justice Powell), or that "an appropriate governmental interest [is] suitably furthered

by the differential treatment," *Chicago Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972) (Mr. Justice Marshall), the test was met here.

A purpose to determine whether and how improvements can be made in the welfare system is as "legitimate" or "appropriate" as anything can be. This purpose is "suitably furthered" by controlled experiment, a method long used in medical science which has its application in the social sciences as well. As Mr. Justice Brandeis said in his famous dissent in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932), "To stay experimentation in things social and economic is a grave responsibility." Just as the Due Process clause should not have been read to condemn the experiment in the "laboratory" of "a single courageous State" involved in *New State*, the Equal Protection clause should not be held to prevent a state from conducting an experiment designed for the good of all, including the participants, on less than a statewide basis. The objections to allowing officials "to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected," eloquently voiced in Mr. Justice Jackson's concurring opinion in *Railway Express Agency* v. *New York*, 346 U.S. 106, 111 (1949), are inapposite to the selection, on a random but rational basis, of certain areas of the state to try out a program for the very purpose of determining whether it, or some variation of it, should be made applicable to all. The Equal Protection clause does not place a state in a vice where its only choices in dealing with the problems of welfare are to do nothing or plunge into statewide action. Once it is determined that New York may justifiably conduct an experiment in certain areas, appellants' objections, going to details, *e.g.*, that there was no need for so large a sample as

PSWOP's 25%,[31] that the areas chosen were not shown to have any greater need than others, etc., does not require discussion. As said by Mr. Justice Holmes, dissenting in *Louisville Gas Co.* v. *Coleman*, 237 U.S. 32, 41 (1928), "when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." See also *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Metropolis Theatre Co.* v. *Chicago*, 228 U.S. 61, 69-70 (1913).

Appellants' due process objections center about the procedures for determining whether welfare recipients are employable within the criteria of the two projects or, even if so, have "good cause" for declining a particular job opportunity.[32] While we do not consider appellants'

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31 Appellants argue that if 2.5% sufficed for IFI, it should also have sufficed for PSWOP. But IFI is a relatively minor variation on PSWOP, and the State could rationally determine that a larger sample was needed to test the basic program than the embroidery upon it.

32 Appellants suggest that good cause would exist if the project did not meet the State's minimal requirements, such as:

1. Reasonable assurance that work will be performed in such a manner to insure that the work is useful;
2. Persons assigned to such projects will not be used to replace, to perform any work ordinarily and actually performed by regular employees of any department or other unit of government, or to replace or to perform any work which would ordinarily be performed by craft or trade in private employment. (In the event of an extreme emergency, such as a flood, fire, etc., such a restriction could be waived so long as the work to be performed was work normally undertaken by the sponsor of the project.);
3. Appropriate standards of health, safety and other conditions are established and maintained. Participants should be given adequate protection against hazards or activities which would adversely affect their health;
4. Sanitary facilities should be supplied or available, and a basic standard of cleanliness be maintained;

contention that the standards for determining eligibility and good cause are too vague for fair enforcement to be substantial, we are concerned with the adequacy of the opportunity for a hearing. Although the plans provide for a "fair hearing" under 18 N.Y.C.R.R. § 385 before assistance to an AFDC recipient can be suspended for unjustified failure to accept a job opportunity or to continue to work thereon, appellants argue that this right is unconstitutionally burdened by the provisions of 18 N.Y.C.R.R. § 385.7 that if the result of the hearing is adverse, the recipient shall "be disqualified for thirty days thereafter" and until such time as he is willing to comply. This seems to mean that even if the recipient accepts the determination of the hearing and is willing to take a referral immediately, he would nevertheless be deprived of assistance for thirty days.

The procedural aspect of this element of the case is somewhat puzzling. The thirty-day suspension provision of 18 N.Y.C.R.R. § 385.7 is one of general application, not part of the two projects here sought to be enjoined. Although 28 U.S.C. § 2281 applies to statewide regulations as well as to statutes, see *Oklahoma Gas Co.* v. *Russell*, 261 U.S. 290 (1923), neither the complaint nor the motion for interlocutory relief sought an injunction against the enforcement of the thirty-day suspension provision as such, and, despite a contrary intimation in the district court's opinion, plaintiffs not only did not ask for the convocation of a three-judge court but alleged that none of the claims in the complaint, save one as to the unconstitutionality of 42 U.S.C. § 1315, which was not being pressed on the motion for a temporary injunction, would require the con-

5. Participants shall be required to perform only those physical activities which are within their established physical capabilities;

6. Adequate first-aid supplies shall be available at the site of the project.

vening of such a court. Yet, if it is sought to enjoin 18 N.Y.C.R.R. § 385.7, a statewide regulation, on due process grounds, a three-judge court might well be required,[33] and arguably appellants cannot here press a point which they failed to pursue in the district court in the only effective manner.

The State's brief says that so long as the injunction issued by the district court in *Dublino, supra*, 348 F. Supp. 290, remains in effect "the thirty-day suspension of benefits mandated by 18 N.Y.C.R.R. § 385.7 will not be invoked against any recipient, including those affected by PSWOP and IFI." It suggests also that "[t]he validity of that statewide regulation should be determined in general, rather than relating to the demonstration projects alone." We take this to mean that New York would wish to be able to continue the demonstration projects even if the thirty-day suspension provision were held unconstitutional, whether through the issuance of an injunction by a three-judge court or, possibly, a declaratory judgment by a single judge, contrast *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154-55 (1963), with *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943); see American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 322-23 (1969).

The question of the constitutionality of § 385.7 has its difficulties. Presumably the argument in favor of the thirty-day suspension is that it constitutes the only effective sanction against the assertion of claims for a hearing in every case, with a consequent breakdown of the entire work

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33 We recognize the perennial question whether the attack would be on § 385.7 as such or only "as applied" in connection with PSWOP and WIN, in which event a three-judge court would not be needed since these projects are not statewide. *Moody* v. *Flowers*, 387 U.S. 97 (1967); *Board of Regents* v. *New Left Education Project*, 404 U.S. 541 (1972). See D. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964).

program, since otherwise an adverse determination would simply require the recipient to do what he should have done long before. Yet a somewhat similar argument concerning proliferation of hearings did not win favor in *Goldberg* v. *Kelly*, 397 U.S. 254, 265-66 (1970), on the issue there presented. Appellants argue that the necessitous circumstances of welfare recipients make the risk of a thirty-day suspension, even for the one family member concerned, totally unacceptable; as a practical matter, the suspension thus operates as a denial of a hearing before an unemployable recipient, or one with good cause for refusal, is forced to accept employment, with possibly drastic results for his children. Compare *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920).

We are reluctant to decide such a difficult question with the almost total absence of briefing the defendants have afforded. The State's entire discussion of the point takes less than a page; the only citations are *Goldberg*, which scarcely assists it, and a statement in *Dublino, supra*, 348 F. Supp. at 299, that "[t]he Commissioner's representations effectively nullify plaintiffs' argument on the absence of and need for a fair hearing upon a determination of employability and before termination . . . . " There is nothing to inform us whether argument in *Dublino* focused on the thirty-day suspension. The brief of the federal defendants is equally cursory on this point, with *Dublino* the only citation.[34]

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34 We think it appropriate to note how little help we have received from the defendants' briefs—a circumstance not unusual in welfare cases. Three-quarters of the State's brief deals with questions of standing and jurisdiction; it contains no table of cases as required by F.R.A.P. 28(b). The largely conclusory brief of the federal defendants contains neither an index nor a table of cases, similarly required. Although the appeal was heard on an expedited basis, it had been pending in the district court for several months, and counsel must have anticipated that an appeal would be taken whatever the result below.

In light of the State's representation that the thirty-day suspension will not be enforced so long as the *Dublino* injunction remains in effect, the district judge could have thought there was no immediate need for granting temporary injunctive relief on that issue. We believe, however, the plaintiffs should have protection, if that injunction should be dissolved, pending judicial resolution of the validity of the thirty-day suspension clause. On this issue, although not on the rest of the case, we consider plaintiffs to have met the test of *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2 Cir. 1953), that if the balance of hardships tip decidedly in their favor, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and for more deliberate investigation." We therefore direct that the denial of the temporary injunction be modified so as to enjoin the State defendants from enforcing the thirty-day suspension until its validity with respect to PSWOP and IFI has been finally determined.

As so modified, the order denying the temporary injunction is affirmed. The stay heretofore entered is continued until ten days after the filing of this opinion and if, within that period, an application for a further stay is made to the Supreme Court pursuant to its Rules 50 and 51, until the decision thereof. No costs.